No. 03-56498

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT; SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE OF GREATER LOS ANGELES; and NATIONAL ASSOCIATION OF COLORED PEOPLE, CALIFORNIA STATE CONFERENCE OF BRANCHES,
Plaintiffs-Appellants,

v.

KEVIN SHELLEY, in his official capacity as California Secretary of State,
Defendant-Appellee.

On appeal from the United States District Court
for the Central District of California
The Honorable Stephen V. Wilson
C. D. Cal. Case No. CV 03-5715 SVW (RZx)

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INTRODUCTION

The Secretary of State concedes much. Proclaiming that both he and his predecessor "have taken aggressive steps to eliminate the use of punch-card machines statewide," he acknowledges the disparities produced by those machines, and he does not dispute that plaintiffs' factual evidence gives rise to violations of the Constitution and the Voting Rights Act. Thus, plaintiffs and the Secretary of State – the principal parties to this litigation – disagree only with respect to whether *res judicata* and laches bar this action, and whether the public interest would be served by the injunction plaintiffs seek.

Intervenor Ted Costa – the only party to this litigation whose interest is avowedly partisan – is alone in challenging the factual and legal underpinnings of plaintiffs' case. Yet in so doing, it is Costa – not plaintiffs – who seeks to relitigate the *Common Cause v. Jones* case, in which the former Secretary of State wisely declined to defend the indefensible, and instead acceded to the replacement of voting machines he thereafter decertified as "obsolete, defective, or otherwise unacceptable." Postulating without any support that the Secretary was "[b]owing to political pressure" when he settled the prior litigation, Costa defends the reliability of the discredited technology that he alone aggrandizes as "venerable" on the basis of such bizarre speculation that the racial disparity in error rates might

be attributable to "disaffected white voters" in majority-minority districts who deliberately cast non-votes as some "form of protest."

More surprising even than Costa's improbable testimonial to the virtues of punchcard technology is his blatant disregard of the clear import of *Bush v. Gore.* Only by dismissing the implications of the that holding can Costa similarly dismiss the substance of plaintiffs' complaint and defend an election in which tens of thousands of votes will be dead on arrival at the ballot box, concentrated in six of California's 58 counties. With respect to the Voting Rights Act, Costa's argument would appear to call for a speedy overruling of this Court's decision in *Farrakhan* on its two principal grounds: that the VRA requires no showing of intentional discrimination, and that a causal connection between a challenged voting practice and disparate racial impact suffices to establish a violation.

Notably, neither the Secretary nor Costa raises *any* objection to the postponement of the vote on Propositions 53 and 54 to their originally scheduled date of March 2, 2004. Both initiatives were formally certified for the March 2, 2004 ballot by the Secretary of State, and were belatedly – and controversially – advanced to October 7, 2003 only after the recall was itself certified. Whatever value this Court ascribes to the interests advanced by the Secretary and Costa regarding the importance of conducting the recall promptly, no such interest has

been advanced – and none exists – that would stand in the way of restoring the initiative votes to their originally certified date. Indeed, the initiatives, should they prevail, do not even take *effect* for years – until 2006-07 (Proposition 53) and 2005 (Proposition 54). And, given the unfortunate confluence between the racial disparities produced by punchcard machines and the racially charged content of the Ward Connerly-sponsored Proposition 54, the case for restoring the initiatives to the March, 2004 ballot is uniquely compelling.

Certainly after *Bush v. Gore*, this case raises no new constitutional questions; indeed, the principal distinction is that here there is no doubt that punchcard voting machines will not correctly count and report every voter's vote, whereas in Florida there was only speculation that this might occur should the recount go forward. Just as in *Bush v. Gore*, then, the difficult question is one of remedy, and neither the Secretary nor Costa does any service to this Court by refusing to acknowledge the nature of that difficulty. What must be conceded is that whatever courts have said about whether elections should be enjoined, they were not dealing with an election like this one. That is to say, in every prior case, failure to hold the election as scheduled would necessarily have meant vacant offices, or offices filled by judicial fiat rather than the will of the people as expressed through the ballot box. It comes at no surprise, then, that courts have

only rarely, and very reluctantly, permitted such elections to be enjoined.

A fair evaluation of the equities presented by this peculiar controversy must begin with an acknowledgment that the state scheme for recall reflects a strong interest in prompt resolution of the governor's status. For many of the reasons identified by the Secretary of State, the timing requirements established by the California Constitution ought not easily to be overcome. But the balance here is struck by the Supremacy Clause, which defines the hierarchy of our federalism. Though Costa would frame this dispute as positing the rights of some minority voters on the one hand against the rights of all California voters on the other, the real conflict here is between the federal demand that all voters be treated equally and the state provision governing the timing of recall elections. And the Supreme Court has made absolutely clear that "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Bush v. Gore*, 531 U.S. 98,108 (2000).

The state's interest would be stronger – and almost certainly decisive – were plaintiffs seeking to postpone a regularly scheduled election, as such a challenge would place the strong federal interest in voting equality in opposition to the even stronger federal interest in permitting citizens to choose their representatives. Here, in contrast, a brief postponement of the recall election will not work a disenfranchisement of the citizenry, and will not leave government in the

hands of the judiciary, but will instead guarantee the fairness of the electoral process. The Secretary of State ignores these distinctions, and Costa glibly derides them, barely concealing his real interest in this case – the removal of the present governor. But these distinctions are determinative. This Court must reverse the denial of the preliminary injunction and prevent the needless disposal of some 40,000 votes disproportionately cast by voters of color.

ARGUMENT

I. THE CLAIMS ASSERTED HERE COULD NOT HAVE BEEN RAISED IN *COMMON CAUSE V. JONES* AND THEREFORE CANNOT BE BARRED BY *RES JUDICATA*

Appellees' arguments in support of the district court's flawed analysis of the *res judicata* issues in this case never once address the principal reason why the judgment in *Common Cause v. Jones* ("*Common Cause*") cannot operate as a bar to the prosecution of this case. As appellants noted in their opening brief, the earlier litigation, which challenged the certification of PPC voting machines for use in statewide elections in some, but not all, California counties, did not and could not conceivably have addressed the issues presented here. This case challenges the permissibility of squeezing an unscheduled statewide recall election into the narrow crack in time during which some of the counties that are subject to the *Common Cause* consent decree (the "Consent Decree") have made the

transition to more accurate vote counting equipment, while other typically less affluent counties with higher minority populations predictably have not. Even if this claim could have been imagined when the Consent Decree was entered – six months before Governor Davis was even reelected – it could not have been adjudicated by an Article III court because it did not present a ripe controversy. Because the claims raised here could not, as a jurisdictional matter, have been asserted in *Common Cause*, the judgment there does not bar this lawsuit.

Appellees cannot seriously suggest that appellants' challenge to scheduling the upcoming recall election prior to the effective date of the Secretary of State's decertification of PPC voting machines was a ripe controversy at the time the Consent Decree was entered, on May 8, 2002. "A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1997) (*quoting Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-581 (1985) (*quoting* 13A Charles A. Wright, et al., Federal Practice & Procedure § 3532, at 112 (1984))). Costa informs us in his brief that the effort to recall Governor Davis was not even conceived until February 1, 2003 – nine months after the Consent Decree was entered. Costa Br. at 6. Even then, the recall election did not become a certainty until it was certified by the Secretary of

State on July 23 and scheduled for October 7 by the Lieutenant Governor on the following day. At the time the Consent Decree was entered (over 14 months earlier), claims like the ones asserted in this case would have been premised on "contingent future events" that might never have come to pass, i.e., the speculative possibility that a gubernatorial recall effort would be conceived, successfully implemented, and the recall election scheduled during the period before all of the PPC counties had converted to more reliable voting equipment. As a constitutional matter, the federal court that heard *Common Cause* would therefore have lacked jurisdiction to entertain such claims, which did not become ripe until over a year after the Consent Decree was entered. *See Cardenas v. Anzai*, 311 F.3d 929, 933 (9th Cir. 2002) (ripeness is a threshold requirement without which federal courts lack jurisdiction); *Washington Legal Foundation v. Legal Foundation of Washington*, 271 F.3d 835, 850 (9th Cir. 2001) (ripeness is a "jurisdictional matter" "derived from Article III's case or controversy requirement"); *accord Reno v. Catholic Soc. Servs*., 509 U.S. 43, 58 n. 18 (1993).

It is well settled that *res judicata* will not bar claims that could not have been raised in prior litigation.[1] *See* 18 Charles A. Wright, et al., Federal Practice

[1] This is especially true where the court in the first action could not have asserted jurisdiction over the claims in the second case. *See* Restatement (Second) of Judgments § 26(1)(c); 18 Wright & Miller § 4412, at 276; *accord Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 382 (1985); *Feminist*

& Procedure § 4409, at 239-41 (2d ed. 2002) (*res judicata* does not bar subsequent litigation "when the a second action draws on facts or seeks remedies that simply could not have been asserted in the first action.") (hereinafter Wright & Miller); *see also Harkins Amusement Enterprises v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989) (rejecting a *res judicata* defense against antitrust plaintiffs who challenged post-judgment anticompetitive acts of the same nature as those successfully challenged in a prior antitrust lawsuit against the same defendants). Accordingly, because appellants could not have asserted the claims raised here in *Common Cause*, the judgment there does not bar this case under the doctrine of *res judicata*. *See Western Radio Servs. v. Glickman*, 123 F.3d 1189, 1992 (9th Cir. 1997) (*res judicata* only "bars litigation in a subsequent action of claims that were raised or could have been raised in a prior action").

A. The Claims Asserted Here Are Different From Those Raised In Common Cause

Because they misapprehend (or mischaracterize) the nature of appellants' claims in this case, appellees contend that this Court's four-part test for whether two actions raise the same claims supports the district court's finding that their *res judicata* argument is difficult for appellants to overcome. Appellees are wrong. Application of the test clearly demonstrates that this case and *Common Cause v.*

Women's Health Ctr. v. Codispoti, 63 F.3d 863, 869 (9th Cir. 1995).

Jones are different cases, raising different claims, founded upon different evidence, seeking different remedies. For this additional reason, *res judicata* does not bar appellants' prosecution of this case.

As appellees suggest, the Ninth Circuit determines whether two claims are the same for *res judicata* purposes by analyzing the following four factors: (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Nordhorn v. Ladish Co.*, 9 F.3d 1402, 1405 (9th Cir. 1993); *accord Fund For Animals, Inc. v. Lujan*, 962 F.2d 1391, 1398 (9th Cir. 1992). When properly analyzed, each of these factors demonstrates that this case asserts different claims from the ones raised in *Common Cause*.

1. No Rights Established By The Common Cause Consent Decree Would Be Impaired By Prosecution Of This Case

Appellees and the district court incorrectly assert that the rights established by the *Common Cause* judgment would be impaired by permitting this case to proceed. They suggest that implicit in the March 1, 2004 decertification date required by the Consent Decree was the State's right to use PPC voting machines

in all statewide elections prior to that date. Nothing could be further from the truth. When the Consent Decree was entered on May 8, 2002, none of the parties anticipated any statewide elections occurring between November 2002 and March 2004. No such election was scheduled and no special statewide recall election had ever been held in the history of California. The parties' reasonable expectation thus could only have been that, as a result of the Consent Decree, the November 2002 elections would be the last statewide elections conducted using PPC voting machines. It strains credulity for appellees to assert that they believed they would be entitled to conduct further statewide elections using PPC equipment prior to March 2004. No one even considered that possibility.

A simple analogy demonstrates the inherent flaw in the arguments advanced by the Secretary and by Costa. Suppose that a suit challenging segregated schools were resolved by a consent decree in which the school district agreed to desegregate its school system within two years – the earliest feasible date. (Suppose also that the district had not opened a new school in nearly one hundred years, though it had considered doing so from time to time, and though it of course had always possessed the authority to do so.) *Res judicata* surely would not bar a second constitutional challenge if, one year after the decree was entered, the district unexpectedly opened a new school and permitted only white students to

attend. The opening of a new, racially segregated school would be treated as a separate "transaction or occurrence," and *res judicata* would not prevent plaintiffs from seeking to enjoin this unforeseen constitutional transgression. No court would insist that plaintiffs had "consented" to the existence of segregated schools for two more years, such that new segregated schools could be opened without challenge.

Nor would the successful prosecution of this action impair the state's interest in an "orderly replacement of punch-card balloting." ER 205. The Consent Decree required decertification of PPC machinery by March 1, 2004. The PPC counties therefore have until that date to replace their voting systems. The relief sought in this case in no way changes that deadline. Appellants seek an injunction that would prohibit the use of PPC machines in the gubernatorial recall election. That injunction could be complied with in a number of ways. If the counties that have not yet jettisoned their PPC systems make the transition to new equipment by October 7, the election could be held on that date. If they cannot meet that timetable, the election could be held as soon as the last of the PPC counties is able to convert to another certified voting system. The latest date on which the recall election could be held would be March 2, 2004, which is the first Tuesday following the date by which the Consent Decree mandates decertification

of PPC equipment. The requested injunction therefore would not require the PPC counties to alter the voting systems conversion schedule they set in response to the Consent Decree at all. It would simply require the Secretary of State to postpone the recall election until the last of the PPC counties had completed its conversion. Such relief would not even affect, let alone impair the state's interest in the "orderly replacement" of PPC systems, to the extent it is guaranteed by the Consent Decree.

2. This Case Relies On A Plethora Of Evidence That Could Not Have Been Presented In *Common Cause*

Appellees assume without explanation that the claims in this case will be supported by precisely the same evidence that would have been needed to support the claims in *Common Cause*. The assumption is incorrect. To be sure, some of the statistical evidence about the disparities in error rates between PPC voting machines and other certified systems would be used to support the claims in both cases, but that is only part of the evidence presented here. In this case, appellants have introduced evidence demonstrating that, *inter alia*: (1) the huge number of candidates for governor exacerbates the inherent disparities in voting technologies; (2) a resource-driven consolidation of polling places will disproportionately affect users of antiquated, time-consuming PPC machinery; (3)

the likelihood of voter error is increased as a result of the large number of candidates who will appear on multiple punch cards and whose names will appear on multiple ballot pages, each of which will bear the legend "Governor: Vote for One;" (4) the large number of candidates increases the likelihood that the margin of error will exceed the margin of victory in a close election; and (5) voter education, including that which occurred during the 2002 election cycle, fails to improve the residual vote rate for PPC machines. None of this evidence was presented in *Common Cause*. The marked difference in the evidence submitted in the two cases strongly indicates that they present different claims. *See Nordhorn*, 9 F.3d at 1405 (finding two claims to be different, even though some evidence was relevant to both suits, because certain key evidence was uniquely important in the second case).

3. This Case Seeks To Assert Different Rights From The Ones Successfully Preserved in Common Cause

Nor are appellants asserting the same rights here that they were in *Common Cause*. The *Common Cause* plaintiffs successfully asserted their rights not to be required into the indefinite future to keep voting on unreliable PPC equipment in statewide elections, while voters in other counties were using, and in some instances would have long since used, more modern and accurate voting technology. They did not assert, nor were they granted, a right never to have a

statewide election conducted at a time when disparities still existed between some counties and others; so long as the state was moving expeditiously enough toward statewide uniformity to justify holding one or more of the intervening regularly scheduled elections under imperfectly uniform conditions rather than holding no regularly scheduled elections at all, no denial of the basic requirement of equality was asserted and no relief against such unavoidable transitional lags was granted. Appellants here assert their rights not to have a special statewide recall election deliberately and gratuitously sandwiched into the period when some PPC counties have not quite completed their conversion to more reliable voting systems, rights that were not, and could not for reasons of Article III jurisdiction have been, asserted in the Common Cause litigation.

4. This Case Arises From Operative Facts That Occurred After The Common Cause Judgment Was Entered

For similar reasons, the transactional nuclei of facts underlying the cases are different. *Common Cause* sought to remedy disparities in vote counting accuracy between counties using PPC voting systems and those using other equipment, based on elections occurring 2000 and earlier. This case seeks to prevent the scheduling of a new statewide election before PPC systems are entirely eliminated, premised on the harms that will result if they are used in the upcoming recall

election. As this Court has held in a different context, "[i]t is elementary that new . . . violations may be alleged after the date covered by decision or settlement of . . . claims covering an earlier period." *Harkins*, 890 F.2d at 183 (analyzing *res judicata* issues affecting successive antitrust claims); *accord* 18 Wright & Miller § 4409, at 221-22 (*res judicata* does not bar a claim for injuries arising from conduct occurring after the entry of judgment in a prior suit for declaratory or injunctive relief). As these authorities indicate, *res judicata* does not preclude litigation of this claim based on a recurrence of continuing conduct, prior instances of which were the subject of a resolved lawsuit. The new instance of misconduct constitutes a different nucleus of operative facts and thus gives rise to a separate claim.

All four of the *Nordhorn* factors strongly indicate that the claims asserted here are different from the ones raised in *Common Cause*. Accordingly, appellees cannot establish one of the essential elements of their *res judicata* defense – identity of claims. *See Owens v. Kaiser Foundation Health Plans, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001). Appellees and the district court were thus both simply wrong to say that *res judicata* presents an obstacle to Appellants' success on the merits of its claims in this case. This case must be decided on the merits of appellants' claims. It should come as no surprise to appellees that they will find

no refuge trying to hide behind the Consent Decree in a case they lost.[2]

[2] Appellees conclude their *res judicata* arguments with a series of throwaway arguments that have very little bearing on the question. Each of these arguments reflects a basic misunderstanding of Appellants' claims. First, appellees argue that appellants should have know that it was possible for a statewide recall election to be scheduled during 2003. Even if that were true, it would not have made a challenge to the scheduling of a special recall election during the period just before the remaining PPC counties change to more reliable voting systems ripe for adjudication at the time *Common Cause* was litigated, over a year before the recall election was certified. Second, appellees chastise appellants for not challenging the November 2002 elections or a number of mid-term county and municipal elections in which PPC voting machines were used. As appellants have explained repeatedly, they did not challenge the use of PPC equipment in the November 2002 elections because new voting systems could not feasibly have been implemented by that time. Appellants did not believe the balance of hardships would tip in their favor if they sought an injunction (preventing regular statewide elections until the PPC counties adopted more reliable voting systems) that would have left California without a congressional delegation and statewide officers and would sharply have reduced representation in the state legislature. Appellants did not challenge the use of PPC systems in countywide and municipal elections because their challenge to the use of such voting machinery sounds in equal protection. The problem is that voters in a special statewide election that could easily, and with no disenfranchisement of anyone, be conducted under conditions of statewide uniformity of ballot-counting reliability, are instead compelled by the state to vote at a time when the voters of some counties will predictably confront equipment that, not yet having caught up with that being used in the rest of the state, will be more likely to miscount their votes. The equal protection problem does not arise in local elections where all voters use the same machinery. Finally, Appellees note that the district court could have set a later date for decertification of PPC systems. While that could have happened, it did not, and the abstract possibility that it might have would seem to have no bearing whatsoever on the question of *res judicata.*

B. If This Court Concludes That This Case Presents The Same Claims As Common Cause, It Should Allow Appellants To Pursue The Relief They Seek Here Through A Motion To Alter Or Amend The Judgment In The Earlier Case

Even if the Court finds that this case and Common Cause present the same claims, that finding should not end appellants' challenge to scheduling the recall election prior to the elimination of PPC voting systems from all counties. If this case is considered to be a further iteration of *Common Cause*, which appellants decidedly do not concede, then the relief sought here should be considered in the nature of a Fed. R. Civ. P. 60(b) motion to alter or amend the judgment in that case. *See, e.g., Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 385 (1992) (holding that modification of consent decree should be permitted where significant change in circumstances was not actually "foreseen" by petitioners, and explaining that "[l]itigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree."). Specifically, appellants would seek leave to amend the judgment to provide that no special statewide election could be scheduled until the last PPC county completed its conversion to other certified voting equipment. The premise for such an amendment would be appellants' evidence that the use of PPC machines in the special election would violate their rights under the 14th Amendment and the Voting Rights Act. The

district court indicated its inclination to deny such a motion on its merits, ER 7, for the same reasons that it denied the preliminary injunction in this case. However, if the Court finds that this case is barred by *res judicata*, appellants respectfully request that it provide the district court with the benefit of its views on the merits of their voting rights claims, which appellants will promptly raise there in a Rule 60(b) motion.[3]

[3] The Court could also elect to permit appellants to prosecute this case under the public interest exception to the doctrine of *res judicata*. As this Court has noted, where issues of overwhelming public importance are involved, an exception to *res judicata* may be warranted. *Jones v. Bates*, 127 F.3d 839, 850 (9th Cir. 1997) (finding that violations of voting rights pose one such issue of public importance); *see* 18 Wright & Miller § 4415, at 375 ("the private values of claim preclusion may at times be subordinated to public values that may be deemed more important"). It would be difficult to imagine a case in which the public interest more powerfully weighed in favor of resolution on the merits. Here, the public interest is nothing less than the foundation of our constitutional democracy. It is not merely that voting is the fundamental act of self-government upon which the entire conceit of our constitutional order depends. *See, e.g., Wesberry v. Sanders,* 376 U.S. 1, 17 (1964) ("No right is more precious in a free country than having a voice in the election of those who make the laws under which . . . we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."). The disparities that Costa would have the Court wink at – the needless disposal of some 40,000 votes disproportionately cast by voters of color as if they do not really matter – mocks the transcendence of the Fourteenth Amendment's commitment to political equality.

II. THIS CASE CANNOT BE BARRED BY LACHES BECAUSE APPELLANTS FILED IT WITHIN DAYS AFTER THEIR CLAIMS BECAME JUSTICIABLE

The Secretary's newly minted laches defense is even less availing.[4] It fails for the same principal reason that the *res judicata* argument fails.[5] Appellants could not have filed this case until it became ripe for adjudication, on July 23, 2003, when the Secretary of State certified the recall election. Once that happened, Appellants wasted no time in getting the case on file. Had plaintiffs attempted to do so prior to certification, the court undoubtedly would have dismissed the case as "conjectural or hypothetical," and therefore unripe. It cannot be that plaintiffs' suit would have been barred by ripeness the day before certification, and barred by laches the day after.

In order to establish a laches defense, a defendant must prove both (a) an unreasonable delay by the plaintiff in bringing the claim and (b) prejudice to the defendant resulting from the delay. *Kling v. Hallmark Cards, Inc.*, 225 F.3d 1030, 1036 (9th Cir. 2000); *Couveau v. American Airlines*, 218 F.3d 1078, 1083 (9th

[4] The Secretary did not raise this defense below, and the district court erred in considering it *sua sponte.* Under Federal Rule of Civil Procedure 8(c), laches is an affirmative defense, and thus cannot properly be considered when it is not raised by defendants. Costa has not invoked laches as a bar to plaintiffs' action, either here or below.

[5] Perhaps recognizing the weakness of the defense, given the facts presented here, Costa does not include any arguments in his brief in support of the district court's analysis of the laches issues.

Cir. 2000). The Secretary's laches argument fails on the first of these two elements. Appellants brought this case 14 days after their challenge to the scheduling of the recall election first became ripe for adjudication, i.e., when the election was certified. There was no delay, let alone unreasonable delay. Accordingly, there is no laches defense.

The Secretary attempts to prove delay by making the bogus argument that appellants waited "almost two years" to file the claims asserted in this case. Here again, he argues that appellants should have known that it was possible for a statewide recall election to be scheduled between November 2002 and March 2004. Once again, the argument misses the point. Appellants' challenge to the scheduling of the recall election prior to the elimination of PPC voting from all California counties was not ripe and thus could not have been adjudicated prior to the certification of the election on July 23. Appellants' awareness of the abstract and remote possibility that a recall election might be certified prior to March 2004 did not render their prompt response to the actual certification of the current gubernatorial recall an unreasonable delay.

Because there was no delay in filing this action, the Court need not analyze whether appellees suffered any prejudice as a result of the delay. The only prejudice that the Secretary actually identifies – the potential postponement of the

recall election – would result from their losing the lawsuit, not from any alleged delay by appellants in filing it. "[T]hat sort of prejudice could be claimed by all defendants all of the time" and does not support a laches defense. *Transworld Airlines, Inc. v. American Coupon Exch., Inc.*, 913 F.2d 676, 696 (9th Cir. 1990).

The Secretary's suggestion that the counties could have tried to implement new voting systems sooner if they had known that appellants' challenge was of a continuing nature is simply not credible. Prior to July 23, there were no statewide elections scheduled until after PPC voting systems were decertified. Accordingly, even if the counties knew that plaintiffs would challenge the use of PPC machines in any future statewide elections, they would have had no reason to alter the schedule for their voting systems conversions in order to head off a hypothetical challenge to a non-existent election.

The district court's suggestion that laches "poses a significant impediment to prosecution of this suit," ER 209, is wrong. On the record before this Court, neither unreasonable delay by appellants in filing this case nor resulting prejudice to appellees can be established. Accordingly, any laches defense must fail.[6]

[6] "Because laches in an equitable remedy, laches will not apply if the public has a strong interest in having the suit proceed." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 840 (9th Cir. 2002); *accord Hurst v. United States Postal Serv.*, 586 F.2d 1197, 1200 (8th Cir. 1978). The public has a strong interest in protecting the federal constitutional and statutory rights of all voters. Accordingly, even if the elements of laches could be established, the Court should

III. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF PREVAILING ON THEIR CONSTITUTIONAL CLAIM

The Secretary of State's silence with respect to the merits of plaintiffs' constitutional claim speaks volumes: following *Bush v. Gore,* it cannot seriously be argued that the evidence in the record does not present a constitutional problem of serious dimensions. Costa's disparagement of plaintiffs' claim accordingly could only be predicated upon utter disregard of *Bush v. Gore* and its undeniable applicability to the facts of this case. It is. Indeed, apart from a few grudging citations to the *dissents* in *Bush v. Gore,* Costa's brief scarcely acknowledges that the Supreme Court has ever taken notice of deviations in the way votes are counted, and treats the evidence of geographical and racial disparities presented below as trifling.

Suppose that the least affluent counties in California, and those with the highest concentrations of minority voters, still tabulated ballots by hand because they could not afford voting machines. Suppose further that those counties announced prior to the coming election that they likely could not count some 40,000 ballots, because, say, they simply lacked the funds to hire enough vote counters. Surely no court would accept this outcome by adopting Costa's mantra

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allow this case to proceed under the public interest exception to the laches doctrine.

that "voting perfection" is not required, or that county officials must be accorded "flexibility." Costa Br., at 22, 23.

Costa, therefore, can run from *Bush v. Gore*, but he can't hide. Indeed, plaintiffs here present even stronger evidence of inequality, as it is known with certainty that non-random disparities in error rate will result on the basis of county of residence, whereas the *Bush v. Gore* majority could only speculate as to the actual effects of applying "varying standards to determine what was a legal vote." 531 U.S. at 107. As in *Gray v. Sanders*, 372 U.S. 368 (1963) and *Moore v. Ogilvie*, 394 U.S. 814 (1969), both relied upon in *Bush v. Gore*, the state is impermissibly "accord[ing] arbitrary and disparate treatment to voters in different counties." *Id.* (citation omitted).

The Secretary's acknowledgment that "punch-card machines are prone to 'user-error' and that the short time of the election poses special challenges to county election officials," Appellees' Br. at 21-22, confirms that the devaluation of the votes in six counties is an inherent feature of the state's voting procedures for this election. How that proneness to error is characterized – whether as user-error or as intrinsic to the machinery – is constitutionally immaterial, because the result is the same: the disenfranchisement of tens of thousands of voters by use of this decertified equipment. And, as the district court specifically held, these errors

will not be correctable at a later date.

Costa attempts to cloud this clear factual picture, dressing his unlikely defense of punchcard machines in the veneer of expert respectability, but he has missed the boat on this one. The *Common Cause* litigation – and the Secretary's decision to resolve that litigation by acknowledging the inherent defects of punchcards and ordering their replacement – conclusively resolved the question of punchcard machines' reliability, at least in California. Costa could have sought to defend punchcards in that earlier litigation, or at public hearings on decertification, but he did not, nor did anyone else. Indeed, these machines are being challenged and replaced throughout the nation. And, as Dr. Brady observes, where punchcard machines have been replaced, the disproportionately high levels of undervotes and overvotes drop dramatically. ER 164-68, ¶¶ 18-31.[7]

Thus, *Bush v. Gore* conclusively rebuts Costa's legal defense of California's electoral inequalities, and the Secretary's decertification of punchcards and Dr. Brady's careful and thorough analyses utterly demolish his factual defense. Even the Secretary does not dispute that plaintiffs have established a constitutional violation. The only dispute is as to remedy.

[7]As one example among many, Dr. Brady found that the chances of the data for Fresno County showing these results and occurring for reasons unrelated to the differences between the competing systems was one in 10^{38}. *Id*., ER 165, ¶ 23.

IV. PLAINTIFFS HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON THEIR VOTING RIGHTS ACT CLAIM

As set forth in Appellants' opening brief (at 43-47), the use of punchcard machines in the October 7 election will disadvantage racial minorities in two distinct ways. First, racial minorities are more likely to reside in counties that still use punchcard machines, which the Secretary himself acknowledges to be more error-prone than other voting systems. While minorities constitute 46 percent of the population of California's punchcard counties, they make up only 32 percent of the population of the state's non-punchcard counties. ER 162, ¶ 10. Second, even if one looks only *within* the six remaining punchcard counties, those machines have a severe disparate impact upon minority voters compared to white voters. It is an uncontroverted fact that punchcards result in an uncounted vote rate for minority tracts that is *more than three times* that of non-minority tracts (4.0 percent for 100 percent minority tracts, as compared with 1.3 percent for 100 percent nonminority tracts). ER 163, 181, ¶ 11 & Exh. 3. The racial gap in uncounted votes is substantially diminished – and, according to a recent study, is "virtually eliminate[ed]" – when counties move to better voting systems. ER 163, 167, ¶¶ 11, 12, 28.

The Secretary disputes none of this, effectively conceding that plaintiffs

have demonstrated a "causal connection" between the use of punchcards and the disproportionate denial of minority votes, as required by Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. § 1973(b), and this Court's decisions interpreting it. *See Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003). Costa nonetheless insists that plaintiffs have not met their burden. As a matter of law, Costa's arguments run directly contrary to this Court's recent decision in *Farrakhan*, which definitively rejects the high barrier to VRA claims that Mr. Costa would seek to place in the way of disenfranchised minority voters. And as a matter of fact, Costa simply brushes to the side the clear evidence that punchcards result in the loss of minority votes, instead resting his defense of these obsolete machines on self-evidently implausible speculation that "disaffected white voters" in majority-minority districts might somehow account for the striking disparities described in Dr. Brady's careful and thorough analysis.

As this Court held in both *Farrakhan*, the purpose of the 1982 amendments to Section 2 of the VRA was to "relieve plaintiffs of the burden of proving discriminatory intent." 338 F.3d at 1014. Under Section 2 as amended, the pivotal question is whether there is a "*causal connection* between the challenged voting practice and [a] prohibited discriminatory result." *Farrakhan*, 338 F.3d at 1018 (*quoting Smith v. Salt River Project Agricultural Improvement and Power*

Dist., 109 F.3d 586, 595 (9th Cir. 1997)) (emphasis added).

While Costa acknowledges at the outset that this is the proper standard (Costa Br. at 30), he proceeds to assert and apply a much more stringent test – one that would effectively read back into the VRA the very "intent" requirement that Congress meant to eliminate. Relying on out-of-circuit authority, Costa attempts to argue that a causal connection between the use of punchcards and the disproportionate denial of minority votes is insufficient to show a VRA violation. *Id.* at 31, 32 (citing *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986) (rejecting challenge to Tennessee felon disenfranchisement statute) and *Ortiz v. City of Philadelphia*, 28 F.3d 306 (3d Cir. 1994) (rejecting challenge to statute allowing for removal of inactive voters from registration lists)). While Costa is less than completely clear about what more *should* be required, he embraces the district court's reliance on the lack of "historical discrimination or present animus" and on whether the machines "are intended to limit" minority voting strength. Costa Br. at 34. That is of course precisely the intent requirement that Congress amended the VRA to eliminate. Nor can Costa justify the use of punchcard machines on the ground that they are a "facially neutral" voting procedure, Costa Br. at 30, without confounding Section 2's core purpose. Indeed, this argument would legitimate such practices as literacy tests and grandfather clauses which, though neutral on

their face, are plainly discriminatory in their results.

This Court's precedent establishes that the amended Section 2 prohibits practices that "*result[] in* discrimination on account of race." *Farrakhan*, 338 F.3d at 1015 (emphasis added). Plaintiffs need not demonstrate either discriminatory intent or facial non-neutrality. It is certainly correct, as this Court explained in *Salt River*, that a "bare showing of disparate *impact*" does not suffice to make out a VRA claim. 109 F.3d at 595. Plaintiffs must show a "causal connection" between the challenged practice and the disparate racial impact. *Id.*

In this case, Plaintiffs have amply demonstrated precisely the "causal connection" that *Farrakhan* and *Salt River* require. Dr. Brady's data and analysis confirm that the uncounted vote rate for punchcard machines is more than twice that of any other system, and reduce to a statistical nullity the possibility that these variations occurr by chance or due to some other factor. ER 164, 165, 166-67, 177 ¶¶ 18, 23, 25-27, & Exh. 1. As Dr. Brady explains, the poor performance of punchcard machines "was the result of using punchcards and not other characteristics of the punchcard counties." ER 164, ¶ 19.

Moreover, Dr. Brady's data unequivocally demonstrate that, within punchcard counties, these machines disproportionately result in lost minority votes – over three times more in minority than in white census tracts. ER 163, ¶ 11

(noting that residual vote rate for 100 percent minority tracts is 4.0 percent, while rate for 100 percent nonminority tracts is 1.3 percent); *see also* ER 165, ¶¶ 21-24. He further shows that the racial disparity is greatly reduced, if not eliminated entirely, when counties move to better voting systems, in a way that cannot be explained by any other factor. ER 166-67, 169-71, ¶¶ 25, 26, 35, 39. In fact, as Dr. Brady explains, a recent study confirms that converting to better voting systems "can virtually eliminate the black-white disparity in invalid ballots." ER 167, ¶ 28.

Dr. Brady thus conclusively refutes Costa's speculation that the racial disparity in uncounted votes can be attributed to something other than the use of punchcard voting machines. ER 188-89, ¶¶ 7-9. On the other hand, Costa offers nothing more than speculation for his suggestion that "disaffected white voters" in majority-minority districts, casting non-votes as "a form of protest," might conceivably be causing this disparity. Costa Br. at 37. Costa attempts to explain away punchcard machines' glaring racial disparity by observing that "African-American voters tend to abstain in greater numbers when an African-American is not on the ballot." Costa Br. at 35. But this cannot account for the racial disparity in invalid votes cast with punchcards. As even Costa's *own expert* has recognized: "We usually find a significant black-white residual vote gap even

when African Americans can vote for majority-party black candidates." ER 189, ¶ 8. Accordingly, "even in the situation where the residual vote gap between minorities and others should be smallest because a minority is running for office, there is still a significant residual vote difference between minorities and non-minorities when punchcards are used." *Id.* Costa's speculation aside, there is no other plausible explanation for the wide racial disparity in uncounted votes, other than the use of punchcards.[8]

[8] The out-of-circuit authority cited by Costa is of little help to him. In *Ortiz v. City of Philadelphia*, the Third Circuit rejected a VRA challenge to a law requiring the removal of inactive voters. As Costa himself acknowledges, plaintiffs in that case "failed to prove a causal connection" between the challenged practice and the disproportionate loss of minority votes. Costa Br. at 32. Rather, as the court explained, "we are faced with the fact that for a variety of reasons, minority citizens have turned out to vote at a statistically lower rate than white voters." 28 F.3d at 313. The challenged practice was not, in that court's view, shown to cause the loss of minority votes.

In *Wesley v. Collins*, the Sixth Circuit upheld a Tennessee felon disenfranchisement law that plaintiffs attacked as racially discriminatory. But this Court's recent opinion in *Farrakhan* – which reversed the grant of summary judgment on a similar felon disenfranchisement claim under Section 2 – establishes the applicable test within this Circuit. In *Wesley*, moreover, the statistical disparity between minorities and whites was caused by a distinction that, in the Sixth Circuit's view, was based upon choices made by the affected individuals. *See Wesley*, 7691 F.2d at 1260-62 (upholding felon disenfranchisement statute on the ground that denial of voting rights was "because of their conscious decision to commit a criminal act"). Whatever the precedential value of *Wesley* within this circuit, it cannot justify the use of punchcard machines. That is particularly true in view of the evidence in this case, showing the considerable reduction, if not elimination, of the racial disparity when counties replace their punchcard machines – a reduction that belies any suggestion that minorities' "choice" to cast invalid votes explains the racial disparity arising from

That California voters have elected two minority candidates to state office in the past 10 years, Costa Br. at 34,[9] cannot defeat plaintiffs' VRA claim. Under Costa's proposed test, even a defective vote-counting device that arbitrarily threw out two of every 100 votes in majority-minority precincts, but not in majority-white precincts, would be perfectly acceptable under Section 2. Unless plaintiffs in such a case could show discriminatory intent, a facial racial classification, or (perhaps) the complete exclusion of all minority candidates from elected office, they would have no hope of prevailing. Quite obviously, this is not what Congress intended when it amended Section 2 to prohibit practices that *result in* the denial

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punchcard machines.

Costa also cites *Johnson v. DeGrandy*, 512 U.S. 997 (1994), for the proposition that even practices that dilute minority votes do not violate Section 2 "if other considerations show that the minority has an undiminished right to participate in the political process." *Id.* at 1012 n.10 (quoting *Baird v. City of Indianapolis*, 976 F.2d 357, 359 (7th Cir. 1992)). But this analysis wrongly conflates *vote dilution* cases with *vote denial* cases, this case being one of the latter. *See, e.g., Burton v. City of Belle Glade*, 178 F.3d 1175, 1196 (11th Cir. 1999)("two distinct types of discriminatory practices and procedures are covered under section 2: those that result in 'vote denial' and those that result in 'vote dilution.'") A vote denial case challenges practices that prevent minorities from having their votes counted, while vote dilution occurs where, despite the ability of all citizens to vote and have their votes counted, an election practice dilutes minority voting strength. Where every citizen has an opportunity to cast a vote and to have that vote counted equally, then the court must look to other indicia to determine whether minorities votes have been diluted. But where minorities votes are *denied* as the direct result of a challenged practice, there is no need to engage in such assessment of circumstantial evidence.

[9]The two candidates are Lt. Governor Cruz Bustamente (elected in 1998 and 2002) and former Treasurer Matt Fong (elected in 1994).

of minority votes. Plaintiffs have more than satisfied the requirements of Section 2, by showing a clear "causal connection" between the use of punchcard machines and the denial of minority votes.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's denial of the preliminary injunction.

Dated: September 8, 2003

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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Case No. 03-56498

I certify that the brief is proportionately spaced, has a typeface of 14 points or more and contains 7,860 words.

_____

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DECLARATION OF SERVICE

Case Name: *Southwest Voter Registration Education Project, et al. v. Shelley*
Case No.: 03-56498
Court: United States Court of Appeals - Ninth Circuit

I declare: I am employed at the ACLU Foundation of Southern California, which is the office of a member of the Bar of this Court at which member's direction this service was made. I am 18 years or older and not a party to the within action; my business address is 1616 Beverly Boulevard, Los Angeles, CA 90026.

On September 8, 2003, I served the following: **Plaintiffs-Appellants' Reply Brief**

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I declare under penalty of perjury under the laws of the State of California and the laws of the United States that the foregoing is true. Dated this September 8, 2003 at Los Angeles, California.

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